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National Association of Manufacturers v. Department of Defense

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National Association of Manufacturers v. Department of Defense, 138 S. Ct. 617 (2018)

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In an attempt to provide consistency to the interpretation and application of the statutory phrase "waters of the United States," as used in the Clean Water Act, the EPA and Army Corps of Engineers together passed the WOTUS Rule. Unfortunately, the Rule has created more confusion than clarity, resulting in a number of lawsuits challenging substantive portions of the Rule's language. *National Association of Manufacturers v. Department of Defense* did not address those substantive challenges, but instead determined whether those claims challenging the Rule must be filed in federal district courts or federal courts of appeals. In its decision, the United States Supreme Court refused to apply the Government's extratextual interpretations of the WOTUS Rule and other applicable regulations, and instead limited its analysis to the plain language of those provisions. The Court concluded that petitions for review regarding the Rule should be filed in federal district courts.

I. INTRODUCTION

In *National Association of Manufacturers v. Department of Defense*, the United States Supreme Court granted certiorari to review the United States Court of Appeals for the Sixth Circuit's ruling in favor of the Environmental Protection Agency ("EPA") and Army Corps of Engineers ("Corps") (collectively, "Agencies" or "Government").[1] The Supreme Court was tasked with determining the proper court in which to file claims challenging the Waters of the United States Rule ("WOTUS Rule" or "Rule").[2] The Government contended that the WOTUS Rule fell within two of seven categories of EPA actions enumerated in the Clean Water Act ("CWA" or "Act") over which federal courts of appeals have exclusive jurisdiction.[3] In a 9-0 decision, the Supreme Court disagreed with the Government's assertions and held that federal district courts were the appropriate forum for challenges to the Rule.[4]

1. Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617, 627 (2018).
2. *Id.* at 624. *See also* Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054 (June 29, 2015).
3. *Id.* at 624.
4. *Id.*

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Judicial Review of the Clean Water Act

In 1972, the CWA was passed "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[5] The term "navigable waters" is often used in substantive provisions of the CWA[6] and is statutorily defined as "the waters of the United States, including the territorial seas."[7] In 2015, after decades of grappling to construct a clear-cut definition and application of the term "waters of the United States,"[8] the Agencies together implemented the WOTUS Rule to "provid[e] simpler, clearer, and more consistent approaches for identifying the geographic scope of the [Act]."[9] The regulations promulgating the Rule make clear that it is meant to define "'the scope of' the statutory term 'waters of the United States[,]'" and that the Rule "does not establish any regulatory requirements[.]"[10]

The CWA contains "two primary avenues for judicial review of EPA actions," and the appropriate avenue depends upon the type of EPA action at issue.[11] Each avenue has "its own unique set of procedural provisions and statutes of limitations."[12] The first path is more general, where challenges to EPA actions are brought in federal district courts under the Administrative Procedures Act ("APA"),[13] and "must be filed within six years after the claim accrues."[14] The second avenue requires challenges to be filed in federal courts of appeals, which are vested with exclusive jurisdiction over seven types of EPA actions, as enumerated in 33 U.S.C. § 1369(b)(1) of the CWA.[15] Those claims "must be filed within 120 days"[16] of the action's promulgation in the "judicial district in which [the party] resides or transacts business which is directly affected by" the

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5. *Id.* (quoting 33 U.S.C. § 1251(a) (2018)).
6. *Id.*
7. *Id.* (quoting 33 U.S.C. § 1362(7)).
8. *Id.* at 625.
9. *Id.* at 625-626 (quoting Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. at 37,057).
10. *Id.* at 626 (quoting Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. at 37,054).
11. *Id.*
12. *Id.*
13. *Id.* at 624.
14. *Id.* at 627 (citing 28 U.S.C. § 2401(a)).
15. *Id.* at 626. The seven types of EPA Administrator's actions enumerated in 33 U.S.C. § 1369(b)(1) include actions taken under title 33: "(A) in promulgating any standard of performance under [§] 1316"; "(B) in making any determination pursuant to [§] 1316(b)(1)(C)"; "(C) in promulgating any effluent standard, prohibition, or pretreatment standard under [§] 1317"; "(D) in making any determination as to a State permit program submitted under [§] 1342(b); "(E) in approving or promulgating any effluent limitation or other limitation under [§] 1311, 1312, 1316, or 1345"; (F) in issuing or denying any permit under [§] 1342"; and (G) in promulgating any individual control strategy under [§] 1314(I)[.]"
16. *Id.* (citing 33 U.S.C. § 1369(b)(1)).

EPA action.[17] When these types of EPA actions have numerous challenges across several circuits, those challenges are consolidated and randomly assigned to a single circuit court.[18]

B. Present Litigation

After the Agencies put the WOTUS Rule into effect, numerous substantive challenges were filed in both federal district courts and federal courts of appeals across the country due to ambivalence about "the scope of the [CWA's] judicial-review provision[.]"[19] Because of the 120 day statute of limitations on challenges to EPA actions under 33 U.S.C. § 1369(b)(1), many of the petitioners in federal district courts were compelled to preserve their challenges by filing protective petitions for review in federal courts of appeals, in case the federal district courts dismissed the challenges for lack of jurisdiction.[20] While the Government's requests to consolidate the federal district court cases were denied, all circuit court challenges were consolidated and assigned to the Sixth Circuit.[21] After consolidation, the Sixth Circuit "issued a nationwide stay of the WOTUS Rule"[22] "pending determination of [its] jurisdiction."[23] The federal district court challenges had varying outcomes; some courts held that district court jurisdiction was lacking and dismissed the claims,[24] while "[o]ne District Court held that it had jurisdiction to review the WOTUS Rule."[25]

The National Association of Manufacturers ("NAM"), the plaintiffs in this action, filed suit in federal district court only, intentionally choosing not to file a protective petition in federal circuit court.[26] "Instead, NAM intervened as a respondent in the Sixth Circuit and . . . moved to dismiss for lack of jurisdiction."[27] Many of the petitioners in the Sixth Circuit also moved to dismiss their own petitions for lack of jurisdiction.[28] The Government disagreed with the motions of NAM and the Sixth Circuit

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17. *Id.* (citing 33 U.S.C. § 1369(b)(1)).
18. *Id. See* 28 U.S.C. § 2112(a)(3).
19. *Id.* at 627.
20. *Id.*
21. *Id.* (citing Consolidation Order, *In re: EPA and Dep't of Def., Final Rule: Clean Water Rule: Definition of "Waters of the United States"*, MCP No. 135 (J.P.M.L. July 28, 2015)).
22. *Id.* at 627 (citing *In re* EPA, 803 F.3d 804 (6th Cir. 2015)).
23. *In re* EPA, 803 F.3d at 806.
24. *Nat'l Ass'n Mfrs.*, 138 S. Ct. at 627 (citing Murray Energy Corp. v. EPA, 2015 U.S. Dist. LEXIS 112944, *17, 2015 WL 5062506, *6 (N.D. W. Va. Aug. 26, 2015) (dismissing for lack of jurisdiction); Georgia v. McCarthy, 2015 U.S. Dist. LEXIS 114040, *12, 2015 WL 5092568, *3 (S.D. Ga. Aug. 27, 2015) (concluding the court lacked jurisdiction to enter preliminary injunction)).
25. *Id.* at 627. (citing North Dakota v. EPA, 127 F. Supp. 3d 1047, 1052-1053 (D.N.D. 2015)).
26. *Id*.
27. *Id.*
28. *Id.* at 627 n.4.

petitioners, arguing that WOTUS Rule challenges fell within the scope of 33 U.S.C. § 1369(b)(1), specifically parts (E) and (F), and therefore federal courts of appeals had exclusive jurisdiction.[29] The Sixth Circuit denied NAM's and the petitioners' motions to dismiss and issued "a fractured decision that resulted in three separate opinions."[30] After the Sixth Circuit denied petitions for rehearing en banc, the Supreme Court granted certiorari.[31] Those Sixth Circuit petitioners who moved to dismiss their own claims subsequently filed briefs in the Supreme Court in support of NAM's suit.[32]

III. ANALYSIS

The Government contended that the WOTUS Rule fell within two of the seven categories of EPA actions listed in 33 U.S.C. § 1369(b)(1) that must be challenged in federal courts of appeals.[33] In addition to extratextual arguments for why the WOTUS Rule fell within subparagraphs (E) and (F), the Government also offered several policy arguments for why WOTUS Rule challenges were better suited for federal courts of appeals.[34] The Supreme Court addressed these extratextual and policy arguments in turn.

A. Exclusive Jurisdiction under 33 U.S.C. § 1369(b)(1)(E)

The Government relied primarily upon subparagraph (E) of § 1369(b)(1) in its argument for exclusive jurisdiction in federal courts of appeals for challenges to the WOTUS Rule. The text of subparagraph (E) covers judicial review of EPA actions "in approving or promulgating any effluent limitation or other limitation under [§] 1311, 1312, 1316, or 1345" of the CWA.[35] Because the WOTUS Rule's purpose was to help "identify[] the geographic scope of the [CWA],"[36] the Government argued that passing the WOTUS Rule "qualifie[d] as an action promulgating or approving an 'other limitation' under [§] 1311."[37] This, the Government claimed, was because the WOTUS Rule defined the scope of those "other" limitations put into effect under § 1311.[38]

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29. *Id.* at 627.
30. *Id.*
31. *Id.*
32. *Id.* at 627 n.4.
33. *Id.* at 628.
34. *Id.* at 632-634.
35. *Id.* at 628 (quoting 33 U.S.C. § 1369(b)(1)(E)).
36. *Id.* at 626 (quoting Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37,054, 37,057 (June 29, 2015)).
37. *Id.* at 628 (internal citation omitted).
38. *Id.* 33 U.S.C. § 1311 is "[o]ne of the Act's principal tools in achieving" the Act's objective, by "prohibit[ing] 'the discharge of any pollutant by any person,' except in express circumstances." *Id.* at 624 (quoting 33 U.S.C § 1311(a)).

The Supreme Court disagreed with the Government's assertions, and based on a plain reading of the text of § 1369(b)(1)(E) and the sections it cross-references, held that the other limitation mentioned in § 1369(b)(1)(E) was narrower than the Government contended.[39] The Government's argument was also rejected because "the EPA did not promulgate or approve the WOTUS Rule under § 1311[,]" as § 1311 did not "authorize the EPA to *define* a statutory phrase" that appears throughout the rest of the CWA.[40] By declining to "disregard[] the statutory text,"[41] the Court "g[a]ve effect to Congress' express inclusions and exclusions" and held that 33 U.S.C. § 1369(b)(1)(E) did not bestow "original and exclusive jurisdiction on [federal] courts of appeals to review the WOTUS Rule."[42]

B. Exclusive Jurisdiction under 33 U.S.C. § 1369(b)(1)(F)

In addition to subparagraph (E), the Government also argued that the WOTUS Rule fell under subparagraph (F) of § 1369(b)(1). Subparagraph (F) deals with EPA actions "issuing or denying any permit under [§] 1342."[43] Under § 1342, the EPA issues permits allowing for limited discharge of pollutants into specific waters for the National Pollutant Discharge Elimination System ("NPDES") program.[44] According to the Supreme Court, the Government "misconstrue[d]"[45] its ruling in *Crown Simpson Pulp Co. v. Costle*,[46] and "ignore[d] the statutory text"[47] of § 1342 by asking the Court to hold that "the WOTUS Rule is 'functionally similar' to permit issuances or denials."[48] Because the WOTUS Rule defines the geographic scope "of [the] EPA's permitting authority[,]" the Government argued that the WOTUS Rule was "functionally similar" to permit issuance or denial,[49] and argued that subparagraph (F) was broad enough to encompass any "agency action that dictates whether a permit is issued or denied."[50]

In dismissing this argument, the Supreme Court "decline[d] the . . . invitation to override Congress' considered choice by rewriting the words of [§ 1369(b)(1)(F)]."[51] Instead, the Court carefully considered the text of

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39. *Id.* at 628.
40. *Id.* at 630 (emphasis in original).
41. *Id.*
42. *Id.* at 631.
43. *Id.* (quoting 33 U.S.C. § 1369(b)(1)(F)).
44. *Id.* at 625, 631.
45. *Id.* at 631.
46. 445 U.S. 193 (1980) (holding that the EPA's action of vetoing a state-issued permit under NPDES conferred exclusive jurisdiction on federal court of appeals).
47. *Nat'l Ass'n Mfrs.*, 138 S. Ct. at 632.
48. *Id.* at 631 (internal citation omitted).
49. *Id.*
50. *Id.* at 632.
51. *Id.* (citing Puerto Rico v. Franklin Cal. Tax-Free Trust, 136 S. Ct. 1938, 1948-1949 (2016)).

the statute and held it to be "unambiguous."[52] Because "[t]he WOTUS Rule neither issues nor denies a permit under the NPDES permitting program[,]" subparagraph (F) was held inapplicable;[53] thus, federal courts of appeals do not have exclusive jurisdiction over WOTUS Rule challenges under § 1369(b)(1)(F).[54]

C. Policy Arguments

The Government also relied upon a number of policy arguments as rationale for granting federal courts of appeals exclusive review of challenges to the WOTUS Rule: (1) avoidance of "an irrational bifurcated judicial-review scheme";[55] (2) "quick and orderly resolution" of WOTUS Rule challenges;[56] and (3) the promotion of "[n]ational uniformity[.]"[57] In summarily dismissing these arguments, the Supreme Court held that "[t]hose considerations—alone and in combination—provide[d] no basis to depart from the statute's plain language."[58] The Court subsequently reversed and remanded the case back to the Sixth Circuit "with instructions to dismiss the petitions [for review of the WOTUS Rule] for lack of jurisdiction."[59]

IV. CONCLUSION

This case is important because it clarifies the proper forum to file substantive challenges to the WOTUS Rule. The Supreme Court's ruling clarified the scope of the exclusive judicial review provision included in title 33 of the CWA. Additionally, the Supreme Court provided a logical, textual analysis of the plain language of the applicable statutes in its ruling, which could provide a helpful guide to understanding of the CWA's language for future challengers of EPA actions under the CWA.

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52. *Id.* (quoting BedRoc Limited, LLC v. United States, 541 U.S. 176, 183 (2004)).
53. *Id.* at 631.
54. *Id.* at 632.
55. *Id.* at 632-633.
56. *Id.* at 633.
57. *Id.* (internal citations omitted).
58. *Id.* at 632.
59. *Id.* at 634.